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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

WILLIAM F. GARLOCK, as Trustee, etc., Plaintiff, Cross-Defendant and Appellant, v. ERICA STANLEY, Conservator, etc., Defendant, Cross-Complainant and Respondent.	H031042 (Santa Clara County Super. Ct. No. CV017902)

Appellant William F. Garlock appeals a judgment entered following a court trial during which the court determined that he had breached his commercial lease by failing to provide the promised building improvements, and failing to pay rent. The trial court awarded respondent Erica Stanley a total of $424,458.36 in damages, consisting in part of unpaid rent, and costs incurred to improve the property.

STATEMENT OF THE FACTS AND CASE

In May 2000, Garlock entered into a commercial lease for property located in Palo Alto owned by Stanley. Garlock's purpose in entering into the lease was to find alternative space for his existing tenant at another property, Jeri Fink.

The property that was the subject of the lease was approximately 3,000 square feet, with an additional 750 square-feet storage area in the back. The lease was for a

period of 10 years, for the rent of $8,500 per month, to be adjusted annually not more than 4 percent.

The commercial lease was a standard, pre-printed form, that included a paragraph warranting that the building, including the structural elements and bearing walls, "shall be free of material defects," and another paragraph, stating that Stanley has no obligations with respect to maintenance and repair of the premises "except for the surface and structural elements of the roof, foundations and bearing walls . . . ." The lease also included the provision: "[a]ny conflict between the printed provisions of this Lease and the typewritten provisions shall be controlled by the typewritten or handwritten provisions."

In addition to the standard, pre-printed language of this commercial lease, the lease in the present case also included the following addendum: "51. Lessor has granted Lessee four months free rent provided Lessee completes repairs and remodel to the building including but not limited to: Two ADA bathrooms and complete HVAC System for the building as described in exhibit A letter to Mike Costa stated May 3, 2000 from Tommy Derrick, broker and included as part of the lease. [¶] 52. Lessee is taking the premises in an 'as is condition.' "

The letter referred to in paragraph 51, and incorporated by reference stated: "It is our intention to make this into a first class building with the major improvements of the bathrooms that meet the current code for the disabilities act, new HVAC, and of course new room divisions, floor coverings and painting. All of this will be done in a way that I think will be pleasing to the owner."

Prior to signing the lease in May 2000, Garlock's agent, James Baer hired a general contractor, Midglen Studio Associates, to inspect the property. After inspection, Midglen sent a letter to Garlock's company, Premier Properties, stating that Midglen had visited the property, and that based on the preliminary review, the front building was feasible to locate tenant Jeri Fink's office. However, with regard to the rear portion of

the property, Midglen stated: "Some items that will need to be addressed during the construction document phase of the project will be: [¶] (1) Is the rear brick building seismically OK and will we be able to use it without doing any upgrade."

In September 2000, Midglen had gutted and stripped the interior of the building in preparation for occupancy. Carroll Meserve, a member of the project team for another Garlock property was brought in to provide HVAC for the property. Meserve was directed to limit the scope of his work to HVAC, despite the obvious structural defects in the property, including unreinforced masonry.

Although Meserve, as a licensed civil engineer had experience with seismic reinforcement of masonry, his proposal of work included no seismic retrofitting of the property.

When Midglen started the project, his contract was initially time and materials, with no fixed budget. Midglen applied for a permit with the City of Palo Alto, and estimated the cost of repairs would be $30,000. Four days after representing to the City of Palo Alto that the cost would be $30,000, Midglen produced a real estimate of the costs to perform the full scope of work as $282,339.00. The reason for the underestimate to the City of Palo Alto was the fact that if the improvements were the range of $260,000.00, the entire building would have been required to be brought to code, including seismic retrofitting. Ultimately, the entire project cost a total of $291,170.00.

Construction on the initial project was completed in January 2001, and tenant Jerri Fink moved into the building in February 2001. When Fink moved in, she used the entire building, including the rear portion for storage.

In June 2001, Midglen examined the rear portion of the building to determine what improvements would be necessary to develop that portion into rentable space. On July 25, 2001, Akio Patrick of Midglen wrote a proposal for James Bear. The summary of the proposal stated that the building was in "very poor structural condition." The

proposal stated: "[t]he building appears to be constructed of unreinforced masonry and could easily collapse in the event of and [*sic*] earthquake."

Midglen was not hired to perform the work on the rear portion of the building, and no changes were made to address the concerns Patrick identified in the proposal.

In April or May 2002, Garlock occupied the rear portion of the building, and used it to house his staff and conduct business.

Around the same time that Garlock signed the lease with Stanley for the commercial property, he began the process of remodeling an office building he owned in Menlo Park to house Garlock and Company. As soon as the remodel of Menlo Park property was finished in 2004, he vacated the Stanley property and moved into his own building. Prior to leaving the Stanley property, Garlock brought Carroll Meserve back to write a report about the structural integrity of the building. Meserve wrote a report stating that the rear portion of the building was constructed of unreinforced masonry and was seismically unsafe.

On March 22, 2004, Stanley's property manager issued a notice to pay rent or quit for non-payment of rent. Prior to that time, Garlock had never contacted Stanley about any concerns about the structural integrity of the building.

On April 14, 2004, Garlock and Meserve presented Meserve's report to the building department at the City of Palo Alto. On April 19, 2004, the City of Palo Alto "red-tagged" the entire premises, including the front of the building.

After Garlock left the property, he continued to use it for storage. Garlock did not notify his tenant, Jerri Fink to vacate, or advise her of the safety concerns.

Stanley retained a contractor to provide an estimate of the cost to upgrade the middle portion of the premises. The contractor estimated it would cost $148,850.00 for those repairs that would satisfy the City of Palo Alto. Engineering fees for the project were estimated at $14,000.00, for a total of $168,500.00.

Garlock filed a first amended complaint (FAC) in April 2004, alleging that he entered into a 10-year lease with Stanley, and expended $350,000 improving the property, but had to vacate the property because it was structurally unsound. The FAC sought damages in the amount of $350,000, and rescission of the commercial lease.

Stanley filed a cross-complaint in July 2004 alleging Garlock was liable for breach of the lease by refusing to pay rent, and refusing to make repairs to the property, and negligent misrepresentation. The Cross-Complaint alleged Garlock accepted the property in an "as-is" condition, and agreed to take on the responsibility to make improvements to the property, and make the property compliant with all building codes. The cross-complaint sought damages of $500,000.

The case proceeded to a seven-day court trial, and at the conclusion of the proceedings, the court found in favor of Stanley, awarding her a total of $424,458.36 in damages, consisting in part of rent unpaid, and in part of costs incurred to improve the rear of the property that Garlock did not improve.

Following entry of judgment, the court ordered Garlock to pay Stanley's attorney fees and costs in the approximate amount of $92,000.00. Garlock filed a timely notice of appeal of the judgment and the fee award.

DISCUSSION

The sole issue in this case is whether the provisions of the lease required Garlock to improve the building, and bring it up to seismic standards.

This appeal turns on whether the trial court correctly interpreted the lease and its adendum. When a trial court's interpretation of a written agreement is appealed, the standard of review depends on whether the trial judge admitted conflicting extrinsic evidence to resolve any ambiguity in the contract. If no conflicting extrinsic evidence was admitted, the interpretation of the contract is a question of law which we review de novo. But if extrinsic evidence was admitted, and if that evidence is in conflict, we will uphold any reasonable construction of the contract that is supported by substantial

evidence. (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166.)

The trial court's threshold determination of ambiguity is a question of law. As such, it is subject to our independent review. (*WYDA Associates v. Merner, supra*, 42 Cal.App.4th at 1710; *Winet v. Price, supra*, 4 Cal.App.4th at 1165.)

When the language of an agreement is ambiguous, parol evidence is properly admitted to determine the language's meaning. "The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' " (*Winet v. Price, supra,* 4 Cal.App.4th at p. 1165, citing *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co*. (1968) 69 Cal.2d 33, 37.) "The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step— interpreting the contract. [Citation.]" (*Winet v. Price, supra*, 4 Cal.App.4th at p. 1165.)

Independently reviewing the contract and the parol evidence, we conclude that the phrase "It is our intention to make this into a first class building" is reasonably susceptible of differing interpretations, including the one urged by Stanley that it includes bringing the property up to seismic code. We therefore determine that the contract is ambiguous and that parol evidence was properly admitted to aid in its interpretation.

It is clear from the record that there were conflicts in the parol evidence admitted to interpret the contract. Furthermore, even the undisputed evidence required the trial court to draw inferences as to the meaning of the contract. "[W]e apply the substantial

evidence rule and defer to the trier of fact where the inferences are conflicting." (*Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1312.)

Here, the trial court reviewed the extrinsic evidence, and the lease provisions and determined that Garlock, through his promise to deliver a "first class building" was responsible to bring the building up to seismic code. In particular, the trial court determined that Garlock's agreement to accept the building in an "as-is" condition, with a further commitment to upgrade the building to make it "first class," was an agreement to make the building comply with all relevant city codes, including those mandating seismic safety.

Garlock asserts that seismic upgrades were not included in the scope of the promised remodel, because the lease contained two pre-printed clauses related to structural repairs. In paragraphs 2.2 and 7.2 of the lease, the responsibility for structural repairs is placed on Stanley. Specifically, paragraph 2.2 warrants that the building, including the bearing walls, "shall be free of material defects," and paragraph 7.2 states that Garlock has no obligations with respect to the maintenance and repair of the premises "except surface and structural elements of the roof, foundations and bearing walls . . . ." Garlock asserts these pre-printed provisions of the lease are controlling.

While the pre-printed provisions do state that the structural repairs are the responsibility of the lessor, the addendum to the lease includes Garlock's promise to deliver to Stanley a "first class building." This type-written addendum takes precedence over the pre-printed provisions of the lease under the general rule of contract construction pursuant to Civil Code, section 1651, as well as the specific provisions of the lease itself, that included the following: "[a]ny conflict between the printed provisions of this Lease and the typewritten provisions shall be controlled by the typewritten or handwritten provisions."

Moreover, the trial court's conclusion that "first class building" included seismic upgrades is supported by substantial evidence. Specifically, Stanley's expert testified

that a sophisticated lessee, such as Garlock, who agrees to lease a building in an "as-is" condition, would be taking the risk of all corrective repairs that would be needed to use the property. In addition, the expert testified that a promise to create a "first class building," required "bringing it up to really the highest standard in the market," and that Garlock's improvements of the building did not rise to that level, because they did not bring the building into compliance with seismic codes.

In addition, in considering the conduct of Garlock in particular, it is clear there was a mutual understanding that improvements necessarily included seismic retrofitting. "The rule is well settled that in construing the terms of a contract the construction given it by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' intent. [Citation.]" (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851.)

In this case, many of Garlock's actions demonstrate that he believed that he had the responsibility to provide seismic repairs to the property as part of the lease agreement. For example, Garlock's contractor for the building improvements, Midglen, purposefully understated the cost of the project so as to avoid the City's requirements for upgrading the entire premises to be compliant with City code, including seismic retrofitting. Midglen notified Garlock in 2001, that the rear portion of the premises was in "very poor condition," yet Garlock did not authorize the improvements the contractor recommended. Instead, Garlock made minimal improvements to the rear portion and used that portion of the business for three years to conduct business. It was not until 2004, when construction on Garlock's own building was completed, that Garlock first complained to Stanley about the structural integrity of the premises, and after threatening Stanley with litigation, contacted the City to have the premises "red-tagged."

The trial court interpreted Garlock's conduct as demonstrating that he did, in fact, know that he was obligated to provide seismic retrofitting as part of the lease agreement,

and his concerns about the structural integrity of the property in 2004, was a pretext to abandon the lease and move into his own newly remodeled building. Our review of the record reveals substantial evidence to support the trial court's conclusions in this case.

We conclude that any ambiguity in the lease and its addendum is resolved by application of the general rules of contract interpretation discussed above, and we find the trial court's construction of the agreement both reasonable and supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

_____
McADAMS, J.

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DUFFY, J.